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Philosophy of International Law, written by Anthony Carty

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Anthony Carty, *Philosophy of International Law*. Edinburgh: Edinburgh University Press, 2017, 2nd edn. (1st edn: 2007), 300 pp., ISBN: 9780748675500, £ 90.00.

The second edition of Anthony Carty's *Philosophy of International Law* could be described as a meditation on what legal doctrine could and should do in international law. According to Anthony Carty, the current 'place of doctrine in international Law' is characterised by its loss of authority, since lawyers have completely brushed aside natural law. Drawing on legal history, the author explains that, before modern times, the main purpose of legal doctrine was to re-establish a harmony between different kinds of law (divine law, natural law, and 'positive' law), while thereafter it was 'to buttress the sovereign State (...)' (p. 7). In order to reinforce the sovereign's power, many of the great modern political and legal philosophers claimed to establish a science of law. They sought to establish a set of universally valid, indisputable statements (which – as if by coincidence – preserve and buttress the powers that be) instead of a vague package of reasonable but debatable legal opinions (which, on the contrary, impose – if only because they were uncertain – limits upon the sovereign's power). The logical consequences of this attempt to build a science of law were, first, the progressive degradation of the authority of 'ordinary legal doctrine' – which was ultimately accused of being merely 'dogmatic' – and, secondly, repeated disappointments about what a true science of law can teach citizens, judges, members of parliaments or even academics – that is, at the end of the day, nothing meaningful. This may be the reason why the end of the introduction of Anthony Carty's book suggests that the most reasonable option is to try to express well-balanced views instead of claiming to have direct access to the 'true law' and its 'objective' description, or, on the contrary, to abandon all sense of objectivity.

In adopting this approach, Anthony Carty outlines, in the first chapter, the impossibility for legal scholars to adopt a strictly positivist approach while identifying and interpreting relevant state practice. Although this thesis is convincing, the conclusions that the author draws are not common: legal doctrine (and more specifically the Historical School of Law, and subsequently Roberto Ago) not only shaped the common perception of customary law and the way we currently identify and formulate customary rules. Rather, doctrine also has the legitimacy to directly determine the legal significance of the physical behaviour of state agents, without relying much on international jurisprudence or on state officials' declarations regarding the meaning of such behaviour.

The subsequent chapters, which relate to legal personality in international law (chapter 2) and the existence of states and the use of force (chapter 3), elaborate on the consequences of this approach. In chapter 2, for instance, one

reads that 'the corporate nature of State personality' is an 'illusion' (pp. 61 et seq.), although almost all important international actors assert the contrary. Equally, the author argues that 'the coming into existence of States is not regulated at all by an international legal order' (p. 90) although domestic or international judges and even governments do partially address this issue in legal terms or through legal representations. According to the author, the 'notion of the nation State is', despite this deregulation, '*theoretically* (...) open to the granting of a right to self-determination to a people within an existing State (...)', and 'there is a (...) contextual significance in arguing the merits of self-determination in countries as varied as France, Germany, the United States, China and the United Kingdom, not to mention Africa, South Asia, or Latin America' (p. 91, emphasis in original). In order to defend this twofold opinion, the author discusses the common interpretation of state practice and documents. This has led him to simultaneously accept the idea of a well-rooted international legal principle of effectiveness (pp. 81 et seq.), and the absolute necessity to stand up for a right to self-determination. In the same way, this right is understood at once as a 'human right to secession' (p. 102) and as a 'mechanism that progressive international lawyers try to use to persuade States to accept as a least bad option, and that many States are still refusing to accept in all parts of the world' (p. 101). In summary, the conception of 'international customary Law' that is used leads to present as customary what state officials and domestic and international judges do not recognise as such (a principle of effectiveness), rather than doing so with rules they recognise as such (a right to self-determination, which is in principle not a right to secession).

Likewise, in chapter 3, Anthony Carty suggests that judges, along with legal scholars, should examine not only the relevant facts of a case to decide it, but the whole context in which it took place. According to the author, this is so because what should be important is not only the law in a positivist or liberal sense, but 'political wisdom' (H. Morgenthau) or 'the principles of reason and equity, and the general sense of mankind' (E. Burke) (p. 222). While I think this observation is correct, the consequences the author draws in relation to the use of armed force, are, once again, much more debatable. He asserts, for instance, that the '(...) reflection on the sources of international law on the use of force cannot be confined to a so-called customary law, State practice [?] or even the UN Charter' (p. 116), and that 'there is little to be gained from continuing to place the jurisprudence of the International Court of Justice as the center of intellectual concern of international lawyers' (p. 117). As a result, for instance, 'the Nuclear Weapons controversy may not be usefully posed in conventional positivist legal terms' (p. 124), or 'the question of whether targeted killing by drones in the Middle East is legal is too late to pose' (at least 'if the

departure of Western States from the Middle East is not even a matter present in Western consciousness') (p. 124).

Although he never does so explicitly, Anthony Carty is not far from suggesting that, in the same way as there is no international law on 'the coming into existence of states' (p. 90), 'there is no international law on the use of force, at least not in a positive law sense' (p. 138). According to him, states are beasts and '[t]hese beasts are not at all open to an Habermasian dialogue conducted with Vattelian civility'. '[W]here a State's existence is threatened (...), all options are on the table' (p. 216). States cannot observe a rule that goes against their short-term interests, or do so simply because they are convinced that it is a rule of law with which they have to comply. Thus, international lawyers should not focus on customary and treaty rules, but rather on 'how each individual collectivity – Vattel calls them Nations, but now most usually States – understands the threats that it faces' (p. 215).

At first sight, the fourth and last chapter (there is no overall conclusion) does not have much to do with the rest of the book. It addresses issues such as the unwarranted domination of the US dollar, the intrinsic connection between US aggressive policies towards fragile states and the economic instability and weakness of the US itself, or the origin and development of the sub-prime crisis. The link between this chapter and the rest of the book is, however, clarified when Anthony Carty points out (p. 273) that

the argument of the 'new' natural law of the Introductory Chapter (...) indicate[s] that it is perfectly possible, and, ethically, absolutely essential, for a philosophy of international law to focus upon and clarify what are the responsibilities of individuals in situations of economic and financial challenge, just as much as in political and military contexts.

Probably on the basis of this 'new natural law', the book ends with a plea for a radical reform of international financial institutions (pp. 292–293).

One of the most striking qualities of the book is the great variety of sources upon which it draws – not only in English but also in French and German. The author relies not only on law books and articles, but also on research carried out in the fields of sociology, history and international relations. Moreover, since Carty discusses the works of others (for instance David Harvey, Emmanuel Todd or Alexander Wendt) at length, no reader will finish the book without having learnt a great deal. There is also a very interesting analysis of the British reflection on the role of legal doctrine at the end of the nineteenth century and the beginning of the twentieth century (pp. 10 et seq.), or on the views offered by lawyers from West Germany, when Germany was split into two parts, on

the 'personal dimension' of the state and people's right to self-determination (pp. 74 et seq.). Despite everything that can be gained from reading the book, readers may however have some reservations or questions about it. In particular, the following observations can be drawn.

First, the necessity of legal positivism for the triumph of political liberalism, and the necessity of classical natural law for the success of Democracy seem to be discarded, ignored or overlooked. Instead, Anthony Carty frequently opposes classical natural law and Democracy, or legal positivism and political liberalism. I must confess to disagreeing with that statement. Thomas Hobbes is the father of modern liberal theory *and* of legal positivism, and Anthony Carty – who on the other hand devotes exciting pages to Hobbes' thinking – sometimes seems to forget this essential fact. In most cases, the theory of legal positivism goes hand in hand with the 'liberal paradigm of law' (one need merely think of Hobbes, Spinoza and Bentham, or Kelsen, Hart and Troper). Conversely, the 'democratic paradigm of Law' and an actual political regime that claims to be based on Democracy by no means emerged in the sixteenth and seventeenth centuries with legal positivism, but rather in Greek antiquity, at the same time as political philosophy and classical natural law. This is no coincidence, because a convincing defence of Democracy necessarily includes the statement that Democracy is objectively or truly – and not only traditionally or conventionally considered as – the best political regime.

Secondly, almost all academic books and articles to which reference is made present the opinions of Western scholars; almost all international judicial decisions (arbitral jurisprudence is ignored) seem to be mentioned only for the sake of being criticised; and, above all, state practice and especially the practice of non-Western states is never quoted or referred to. Consequently, the references made to state practice in the body of the text often seem to be identified and interpreted in a debatable manner. In particular, Anthony Carty seems to consider that what matters for achieving an academic determination of the rules of international law is not what most states or state officials declare it is, or the best way to interpret their discourses. Rather, it is how certain states actually behave that counts most, or what he thinks of this 'real' practice, in view of principles we do not know much about. This methodology might be considered as problematic, especially in a book that aims to address the question of the inequality of a positive international law predominantly shaped by Western states and by the US in particular.

Thirdly, most of the author's arguments concerning the 'non-corporative' nature of the state are, in my view, unconvincing. I readily recognise, together with the author, that states are artificial entities. Nevertheless, in reality, people

partially behave in reference to these representations and a natural law approach does not allow this fact to be denied.

Fourthly, the natural law advocacy that Anthony Carty puts forward is not a classical one. The classical natural law argument to which positivist legal scholars never offer any convincing response is that a reference to a fact or a discourse always implies the prior identification and interpretation of the relevant facts and discourses, and that these operations are necessarily based on general principles or criteria that cannot, at the most fundamental level, be positive but must be rooted in the requirements of practical reason. Although I am almost sure that Anthony Carty would agree with that statement, I suspect it is not exactly his point. His point seems to be, rather, that '[l]egal positivism (...) has contractarianism as its origin' and 'that contractualist theory cannot "substitute a procedural approach for every attempt to ground justice on some prior convictions concerning the good for all, the common good of the *politeia* (...)" ((...) Ricoeur, *The Just*, (2000) 37)' (pp. 166–167). Lawyers thus need to systematically 'introduc[e] the contextual dimension' of each legal problem to address it (p. 167). In practice, Anthony Carty seems to interpret this necessity as the necessity to criticise official as well as academic opinions on the rule of law, on the grounds that they are at odds with (his interpretation of) the facts or what he sometimes calls 'diplomatic history' (pp. 36 et seq. and 82 et seq.). In this regard, he could be charged with confusing what happens and what law requires. In regularly putting forward this argument, Anthony Carty directly weakens his unconventional opinions on the right to self-determination or on the policies of the International Monetary Fund. Furthermore, his interpretation of different authors (for instance Vattel, p. 155) and his frequently ironic style seem to betray a tendency to mix up his natural law with a postmodernist approach that often flirts with relativism and nihilism.

What I would see as an uncertain position on the part of the author perhaps mirrors the uncertainty of Western thinking in general, especially since the sudden (virtual) disappearance of Marxism. Since no global doctrine took over from Marxism in its dialectical relationship with liberalism, and since we can thus hardly compare liberalism to a new authoritative alternative, we often feel like orphans or slaves in an intellectual world over which we have no rational control, and in an actual world in which we have no political control.

This situation forces us, while reading books, to focus on and delve deep into the most radical and challenging statements that we encounter. In *The Philosophy of International Law*, it is, in my view, the suggestion that international lawyers should pay more attention to the people (or the 'social body or community' of each state (p. 67)) rather than focusing merely on the state

and the individual, which may be (even) more abstract legal inventions than 'the people'. It is true that every international lawyer has to consider the fact that people are increasingly averse to international law, perhaps because it follows its own path without them. In any event, international lawyers should ask themselves why it is so and how they could change international law and make people less frustrated with it. Anthony Carty's book could certainly help them to fulfill this task.

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